No. 09-773

IN THE

Supreme Court of the United States

STEVEN LERMAN, *et al.*,

Petitioners,

v.

CITY OF FORT LAUDERDALE, FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT CITY OF FORT LAUDERDALE, FLORIDA

FREDERICK T. SMITH
SEYFARTH SHAW LLP
1545 Peachtree St., N.E.
Suite 700
Atlanta, Georgia 30309
(404) 885-1500

GERALD L. MAATMAN, JR.
Counsel of Record
SEYFARTH SHAW LLP
131 South Dearborn St.
Suite 2400
Chicago, Illinois 60603
(312) 460-5000

Attorneys for Respondent
City of Fort Lauderdale, Florida

January 29, 2010

QUESTIONS PRESENTED

I. Whether Petitioners have presented compelling reasons to grant the Petition, where the Eleventh Circuit's Opinion affirming the District Court's summary judgment order does not conflict with a decision of this Court or a Court of Appeals, and where Petitioners do not argue that the Eleventh Circuit's ruling implicates an important federal question that has not been settled by this Court insofar as the Eleventh Circuit applied well-settled law regarding age discrimination waivers.

II. Whether Petitioners have presented compelling reasons to grant the Petition, where the Eleventh Circuit's Opinion affirming the District Court's summary judgment order does not conflict with a decision of this Court or a Court of Appeals, and where Petitioners do not claim that the Eleventh Circuit's ruling implicates an important federal question that has not been settled by this Court insofar as the Eleventh Circuit applied well-settled law on burdens of proof in age discrimination cases.

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JURISDICTION

Respondent does not contest Petitioners' Statement of Jurisdiction.

STATUTORY PROVISIONS INVOLVED

Respondent does not contest Petitioners' statement of the statutory provisions involved. However, it is Respondent's position that the Lilly Ledbetter Fair Pay Act of 2009 is not applicable to this case.

RESPONDENT'S STATEMENT OF THE CASE

Petitioners, a group of current and retired City police officers, allege that the City intentionally discriminated against them because of their age through its Deferred Retirement Option Program ("DROP") in violation of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 *et seq.* ("ADEA").

On September 28, 2009, the United States Court of Appeals for the Eleventh Circuit affirmed the District Court's grant of summary judgment to the City on several grounds. First, because Petitioners signed releases as a prerequisite to entering DROP, the District Court properly held that Petitioners had waived their right to seek legal recourse against the City. Second, the Eleventh Circuit held that the District Court properly found that the City's DROP does not violate the ADEA because Petitioners did not show that age "actually motivated" the City's decision as required by *Kentucky Retirement Systems v. EEOC*, 128 S. Ct. 2361 (2008). Third, the Eleventh Circuit upheld the District Court's determination that even if DROP were discriminatory, it would be permitted under the safe harbor provision of the ADEA, 29 U.S.C. § 623(f)(2)(B)(ii). Finally, the Eleventh Circuit concluded that the LLFPA did not apply in this case.

Petitioners have failed to meet their burden of establishing compelling reasons for granting their Petition for Writ of Certiorari. The Eleventh Circuit's decision does not conflict with decisions of any other federal circuit courts. Nor does the Eleventh Circuit's Opinion involve a departure from the usual course of

judicial proceedings, or implicate an area of federal law left unresolved by this Court in *Kentucky Retirement Systems* and *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009).

REASONS FOR DENYING THE PETITION

The decision below does not conflict with a decision of this Court or any federal circuit court nor does it implicate a federal question that has not been decided by this Court. Accordingly, Petitioners have not carried their burden of demonstrating any "compelling reasons" for the Petition to be granted. *See* Sup. Ct. R. 10.

These and other reasons for denial of the Petition are set forth more fully below.

I. Petitioners Have Presented No Compelling Reasons To Grant The Petition, Where The Eleventh Circuit's Opinion Affirming The District Court's Summary Judgment Order Applied Settled Law Applicable To Age Discrimination Waivers

Petitioners have not shown compelling reasons for this Court to grant certiorari because the Eleventh Circuit and the District Court correctly applied well-settled law regarding waivers of rights under the ADEA. An employee's waiver of his or her rights under the ADEA must satisfy the requirements of the Older Workers Benefit Protection Act ("OWBPA"). *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 426-27 (1998). It is well-established that the requirements of the OWBPA are met if an employee's waiver of his or her ADEA rights is both knowing and voluntary. *Id.* (citing

29 U.S.C. § 626(f)(1)). As set forth more fully below, the Eleventh Circuit's decision is wholly consonant with *Oubre*, and Petitioners have not demonstrated that this Court's review of the decision is warranted.

A. The Eleventh Circuit Properly Found That The Waivers Executed By Petitioners Were Lawful, Consistent With The OWBPA, And Eliminated Any Basis For Their Lawsuit

In affirming the District Court's grant of summary judgment to the City, the Eleventh Circuit properly found that Petitioners knowingly and voluntarily waived their ADEA rights in accordance with the OWBPA and *Oubre*. Pet. App. at 4. Petitioners failed to challenge whether their waivers were knowing and voluntary before the District Court or on appeal to the Eleventh Circuit. Pet. App. at 4, 20. Petitioners have not shown that the Eleventh Circuit's decision conflicts with *Oubre* or any decisions of other federal circuit courts. Because Petitioners' waivers comply with the statutory requirements of the OWBPA and the principles set forth in *Oubre*, the Eleventh Circuit properly upheld the District Court's determination that Petitioners waived their ADEA claims relating to the City's DROP.

B. The Eleventh Circuit Appropriately Found That The LLFPA Does Not Create A New Cause of Action For Each DROP Payment Petitioners Received After Executing Valid Releases

Petitioners contend that under the Lilly Ledbetter Fair Pay Act of 2009 ("LLFPA"), they can pursue

ADEA claims against the City for DROP payments they received after executing valid OWBPA waivers. Specifically, Petitioners contend that a new cause of action accrued each time they received post-waiver DROP payments regardless of when the City decided to include age as a component to the DROP. Pet. at 16. In flatly rejecting this argument, the Eleventh Circuit appropriately found that the LLFPA did not apply in this case for two reasons. First, the LLFPA was inapplicable because it involves the statute of limitations in pay discrimination cases. Pet. App. at 4. Second, the LLFPA did not implicate Petitioners' valid waivers of their ADEA rights. *Id.*

1. The LLFPA Is Not Relevant To Petitioners' Claims, As It Is Limited To The Applicable Statute Of Limitations For Pay Discrimination Claims

As an initial matter, the LLFPA amended the ADEA to make it clear when an unlawful employment practice occurs for purposes of the statute of limitations. Thus, the LLFPA is wholly irrelevant to Petitioners' claims, as it does not nullify or impact a claim that has been waived as part of a release agreement even if the economic consequences of that decision are felt after the signing of the release.

In reversing this Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), Congress concluded that *Ledbetter* "significantly impairs statutory protections against discrimination in compensation" by imposing a restriction "on the filing of

discriminatory compensation claims [that] ignores the reality of wage discrimination." LLFPA, § 2(1) & (2). Congress removed that restriction by amending the limitations period for pay discrimination claims brought under the ADEA and other federal employment statutes. *See id.*, §§ 3-5 (29 U.S.C. § 626(d) as applied to age claims). Specifically, the LLFPA provides that the limitations period under each of these statutes restarts for aggrieved employees upon receipt of each paycheck that allegedly reflects a past discriminatory compensation decision:

> For purposes of this section [*i.e.*, filing a charge of discrimination with the EEOC within the applicable statute of limitations], an unlawful practice occurs, with respect to discrimination in compensation in violation of this chapter, when a discriminatory compensation decision or other practice is adopted, when a person becomes subject to a discriminatory compensation decision or other practice, or when a person is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

29 U.S.C. § 626(d).

The LLFPA has no bearing on the disposition of this case because – as noted by the District Court and

adopted by the Eleventh Circuit in its Opinion – the point where a claim might accrue for purposes of the statute of limitations is not the same as when a claim arises for purposes of a release. Pet. App. 22-23. The purpose of the LLFPA was to amend the statute of limitations in light of the *Ledbetter* decision. There is no indication from either the legislative history or the statutory language of the LLFPA that Congress intended to allow employees to resurrect ADEA claims that they had already waived as part of valid releases.

2. The Eleventh Circuit Properly Held That The LLFPA Did Not Implicate Petitioners' Valid Releases

Petitioners attempt to avoid the LLFPA's plain language and legislative history by arguing that each of their post-waiver DROP payments gave rise to a new cause of action because DROP payments – unlike typical pension payments – involve the calculation of retirement benefits rather than the payment of such benefits. In particular, Petitioners attempt to distinguish the instant case from this Court's decision in *Florida v. Long*, 487 U.S. 223, 239 (1988). In *Long*, this Court held that "[i]t is not correct to consider payments of benefits based on a retirement that has already occurred as a sort of continuing violation." *Id.* at 239. Here, Petitioners submit that the Eleventh Circuit, in adopting the District Court's decision, improperly found that the discovery rule applied to Petitioners' claims because they knew or should have known of their alleged injury before executing the waivers. Pet. at 16. Petitioners urge this Court to hold that the discovery rule is inconsistent with

the plain language of the LLFPA especially where employees continue working for their employers as Petitioners did when they participated in the City's DROP. Pet. at 16.

Notwithstanding Petitioners' contentions, the Eleventh Circuit correctly construed the LLFPA in holding that it does not implicate Petitioners' valid releases. Petitioners have not pointed to any decisions of this Court or any federal circuit court in support of their argument that each post-waiver DROP payment gave rise to a new cause of action in light of the LLFPA. Rather, Petitioners rely on the unreported decision of a District Court in Colorado - *Tomlinson v. El Paso Corporation*, No. 04-CV-02686-WDM-MEH, 2009 WL 2766718 (D. Col. Aug. 28, 2009) - which is inapposite. In *Tomlinson*, the plaintiffs challenged the conversion of the employer's defined benefit plan on the grounds that the "wear away" period – the time that benefits did not accrue until cash balance benefits caught up to and exceeded benefits under the previous formula – violated the ADEA. *Id.* at *1. Although the District Court found that the case involved the rate of accrual of retirement benefits rather than retirement payments such that *Long* was not controlling, the issue in *Tomlinson* was whether the LLFPA applied so that plaintiffs' charges of discrimination were timely filed within 300 days of the alleged discriminatory act (*i.e.*, the date on which benefits accrued). *Id.* at *3-4. In finding that the LLFPA did apply, the District Court reversed its grant of summary judgment to the defendant on Plaintiff's ADEA claims. *Id.* at *4. The District Court was not presented with facts where, as here, employees had executed valid waivers of their ADEA claims. Accordingly, the

unreported decision in *Tomlinson* hardly justifies this Court's review of the Eleventh Circuit's decision.

C. Petitioners Also Fail To Demonstrate That There Are Any Circuit Conflicts On Any Issues Decided Below By The Eleventh Circuit On Post-LLFPA Cases That Demonstrate Any Compelling Reasons To Grant The Petition

Petitioners have not argued, nor can they, that a conflict among the federal circuit courts exists on any of the issues decided by the Eleventh Circuit so that review by this Court would be warranted. Indeed, only a handful of federal circuit courts have had the occasion to even address the LLFPA, and none were presented with the facts and legal issues involved in the instant case. *See Miller v. Kempthorne*, No. 08-2466, 2009 U.S. App. LEXIS 27952, at *2-3 (2d Cir. Dec. 21, 2009) (reversing grant of summary judgment on claim dismissed as untimely as the LLFPA made timely plaintiff's claim that he was classified under the wrong wage grade); *Hester v. N. Alabama Ctr. for Educ. Excellence*, No. 08-17037, 2009 U.S. App. LEXIS 25225, at *3 (11th Cir. Nov. 17, 2009) (vacating district court's order on summary judgment dismissing Title VII wage discrimination claim as untimely in light of the LLFPA); *Mikula v. Allegheny County of Penn.*, 583 F.3d 181, 186 (3d Cir. 2009) (reversing grant of summary judgment to employer as plaintiff's Title VII pay discrimination claims were timely under the LLFPA as to paychecks reflecting a "'periodic implementation' of a previously made intentionally discriminatory employment decision or 'other practice'"); *Rzepiennik v. Archstone-Smith,*

Inc., 331 Fed. Appx. 584, 589 (10th Cir. 2009) (noting that Congress did not intend for the LLFPA to alter the limitations period for retaliation claims brought under the Sarbanes-Oxley Act); *Lipscomb v. Winter*, No. 08-5452, 2009 U.S. App. LEXIS 7036, at *2 (D.C. Cir. Apr. 3, 2009) (remanding failure to promote claims for consideration in light of the LLFPA); *Shea v. Clinton*, No. 08-5491, 2009 U.S. App. LEXIS 7142, at *1 (D.C. Cir. Apr. 2, 2009) (remanding case for consideration in light of the LLFPA).

As indicated by the federal circuit court decisions above, a split of authority on the LLFPA among these courts simply does not exist. Given the recent passage of the LLFPA, conflicting decisions among the federal circuit courts are lacking and thus review by this Court is not justified.

D. Post-LLFPA Cases Cited By Petitioners Do Not Support Their Argument That The Statute Creates A New Cause Of Action For Each Post-Waiver DROP Payment They Received

Petitioners rely on post-LLFPA decisions of federal district courts in support of their contention that lower courts require this Court's guidance with respect to the proper application of the LLFPA. However, none of the cases upon which Petitioners rely supports their position that the LLFPA creates a new cause of action for each post-waiver DROP payment they received. In fact, each of the cases directly involves the applicable statute of limitations for pay discrimination claims, which is precisely what the LLFPA was enacted to

address, but is not at issue here. *See Gentry v. Jackson State Univ.*, 610 F. Supp. 2d 564, 567 (S.D. Miss. 2009) (denying summary judgment to employer where charge of discrimination relating to denial of tenure/denial of salary increase claim was not untimely under the LLFPA); *Vuong v. New York Life Ins. Co.*, No. 03-01075, 2009 WL 306391, at *4 (S.D.N.Y. Feb. 6, 2009) (holding that claim relating to decision to allocate plaintiff a lesser percentage of performance-related compensation than his co-managing partner was timely under the LLFPA); *Rehman v. State Univ. of New York at Stony Brook*, 596 F. Supp. 2d 643, 651 (E.D.N.Y. 2009) (holding as timely plaintiff's wage discrimination claims based on actions that occurred two years before he filed his charge of discrimination); *Shockley v. Minner*, No. 06-478 JJF, 2009 U.S. Dist. LEXIS 31289, at *3 (D. Del. Mar. 31, 2009) (finding that the LLFPA eliminated the discovery rule in Section 1983 cases); *Tomlinson*, 2009 WL 2766718, at *3-4 (LLFPA applied so that plaintiffs' charges of discrimination were timely filed within 300 days of the alleged discriminatory act (i.e., the date on which benefits accrued)).

E. While The Eleventh Circuit Never Reached The Issues, If The LLFPA Applies To This Case As Petitioners Contend, Its Retroactive Application Would Be Unconstitutional Under Both The Due Process And Ex Post Facto Clauses.

Even if Petitioners could establish that Congress intended the LLFPA to apply to their case, the retroactive application of the LLFPA would be

unconstitutional under the Fifth Amendment's Due Process Clause and the Ex Post Facto Clause of the United States Constitution as more fully set forth below. The Eleventh Circuit never addressed these issues, which Respondent raised below as additional reasons for affirmance of the District Court's summary judgment order.[1]

1. Retroactive Application Of The LLFPA Violates The Due Process Clause Of The Fifth Amendment Of The United States Constitution.

The Due Process Clause of the Fifth Amendment protects against the arbitrary deprivation of life, liberty, or property by governmental action. U.S. Const. amend. V. Retroactive legislation that violates the Due Process Clause is unconstitutional. *See Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984) ("The retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former."). Indeed, "[t]he principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and

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[1] Even if Petitioners had established sufficient grounds for granting their Petition for Certiorari (which Petitioners have not established), a remand to the Eleventh Circuit would be more appropriate to consider and rule on this issue.

universal human appeal ... [and] has long been a solid foundation of American law." *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring).

When Congress has provided for retroactive application of a law (as with the LLFPA), such provisions are subject to scrutiny. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995); *Eastern Enter. v. Apfel*, 524 U.S. 498 (1998). To weigh the constitutionality of such provisions, this Court has distinguished retroactive provisions that are primary in nature from those which are secondary in nature. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (distinguishing between primary and secondary retroactivity and stating that "retroactivity is not favored in the law"). Primary retroactivity refers to legislation that converts an action that was lawful at the time it was taken into an unlawful act. *See Plaut*, 514 U.S. at 214. Secondary retroactivity refers to legislation that expands the remedies available for what is already an unlawful act (*e.g.*, allowing for the possibility of compensatory damages where such damages were previously unavailable). *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 275 (1994) (holding, in effect, that where legislation is only secondarily retroactive, its retroactive nature would not, by itself, invalidate the law).

Where, as here, a retroactive provision is primary, it is invalid regardless of Congress' intentions with regard to retroactivity. *See Plaut*, 514 U.S. at 214. In *Plaut*, this Court addressed the question of whether a federal statute that purported to apply retroactively required a federal court to reopen a judgment in a private

civil action. *Id.* The retroactive legislation, Section 27A(b) of the Securities Exchange Act of 1934, sought to undo the effect of a Supreme Court decision by requiring courts to reopen securities fraud cases that had been dismissed based on the Supreme Court's earlier decision. *See id.* at 218. Although the Supreme Court invalidated the statute on the grounds that it violated separation of powers principles, the Supreme Court also noted that the statute's retroactive provision was primary in nature because it altered the legal consequences of past actions by making previously lawful conduct unlawful. *See id.* at 225; *see also Eastern Enters.*, 524 U.S. at 529-37 (holding that retroactive imposition of lifetime employee health benefits liabilities under the Coal Act raised issues under both the Takings Clause and the Due Process Clause of the Fifth Amendment.[2] Justice Kennedy reasoned that "chang[ing] the legal consequences of transactions long closed ... can destroy the reasonable certainty and security which are the very objects of property ownership." *Id.* at 548. As a result,

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[2] The plurality opinion grounded its decision on the Takings Clause of the Constitution, without deciding whether the Due Process Clause would also invalidate the Coal Act. Justice Kennedy, in his concurring opinion, however, clearly felt that the Due Process Clause was a better vehicle for reaching that result. Specifically, Justice Kennedy explained that Congress' attempt to make business owners retroactively liable for funding health benefits for retired miners was unconstitutional. *Id.* at 547.

Justice Kennedy identified the retroactivity of the Coal Act as a violation of the Due Process Clause. *Id.* at 550.

In this instance, the LLFPA is primarily retroactive because it makes conduct unlawful that, prior to its passage, was lawful. Before the LLFPA became law, it was permissible – even common – for employers to obtain releases from employees in exchange for receiving early retirement benefits. *See, e.g., Lockheed Corp.*, 517 U.S. 882, 894 n. 6 (1996) (noting that an employer can protect itself from future liability by asking employee to sign release in exchange for severance); *Lloyd v. Brunswick Corp.*, 180 F.3d 893, 895 (7th Cir. 1999) (noting that employers often offer early retirement benefits to individuals protected by the ADEA to avoid any potential liability). An employer was entitled to rely upon that waiver even if the employee later became dissatisfied with how his severance or early retirement payments were calculated. Now, however, the LLFPA (assuming Petitioners' reading of the statute is correct) holds an employer liable for a past act of discrimination each time an employer issues a discriminatory early retirement payment – paid as a result of an employee signing a release – even if the employer had no reason to suspect that it had discriminated against an employee at the time the release was signed.

In other words, based on Petitioners' construction of the statute, the LLFPA now punishes employers for conduct that occurred prior to the signing of a release, regardless of its present intent and accomplishes this end retroactively. It allows an employee to challenge an early retirement payment as unlawful based solely on a discriminatory act that allegedly occurred prior to the

signing of a release so long as the employee does not receive the payment until after signing the release. Such extreme, primary retroactivity is clearly arbitrary and irrational and, therefore, the LLFPA violates the Fifth Amendment's Due Process Clause. *See Plaut*, 514 U.S. at 214; *Eastern Enters.*, 524 U.S. at 537-38 (O'Connor, J., joined by Rehnquist, C.J., Scalia and Thomas, J.J.); *Id.* at 547-50 (Kennedy, J., concurring); *In Re Workers' Comp. Refund*, 46 F. 3d 818, 819 (8th Cir. 1995); *NRG Co.*, 24 Cl. Ct. 51 (Cl. Ct. 1991).

2. Retroactive Application Of The LLFPA Also Violates The Ex Post Facto Clause, Article I, Section 9, Of The United States Constitution.

Article I, Section 9 of the Constitution provides: "No Bill of Attainder or ex post facto Law shall be passed." U.S. Const. art. I, § 9; *see also Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390-91 (1798) (prohibiting Congress from "making an action, done before the passing of the law, and which was innocent when done, criminal ...."). Although lower federal courts generally have not analyzed the Ex Post Facto Clause in civil cases, this Court has expressed an interest in revisiting its application to civil matters. For example, in *Eastern Enterprises*, Justice Thomas explained that he "would be willing to reconsider *Calder* and its progeny to determine

whether a retroactive civil law ... is ... unconstitutional under the Ex Post Facto Clause." 524 U.S. at 539.[3]

There is no conceptual obstacle to applying the Ex Post Facto Clause in the civil context. Even as formulated in *Calder*, the limitation placed on Congress' power for "mak[ing] an action, done before the passing of the law, and which was innocent when done, criminal; and punish[ing] such action," would squarely prohibit that which Congress has attempted to accomplish through the LLFPA. *Calder*, 3 U.S. (3 Dall.) at 390; *see*

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[3] Commentators have argued that the Ex Post Facto Clause should apply to retroactive civil legislation. Their primary argument – a product of basic statutory construction – is that limiting the Ex Post Facto Clause to criminal legislation renders the clause redundant or unnecessary because the Bill of Attainder Clause already applies to retroactive criminal laws. *See* Laura Ricciardi and Michael Sinclair, *Retroactive Civil Legislation*, 27 U. Tol. L. Rev. 301, 316-18 (1996). Additionally, there is evidence that the phrase "ex post facto" was used synonymously with "retroactive" in every circumstance by the Framers of the Constitution, *see* 1 *W.W. Crosskey, Politics and the Constitution in the History of the United States* 335 (1953), and that the Framers intended it to have a commonly understood and civil meaning. *See* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. Rev. 204, 212 (1980).

also Carmell v. Texas, 529 U.S. 513, 530 (2000). As explained above, before the LLFPA, an employer could safely issue an early retirement benefit payment after the signing of a release without incurring new liability as long as the employer did not commit some new act of discrimination. Again, under Petitioners' interpretation of the statute, the LLFPA makes that same employer's issuance of that same early retirement benefit payment unlawful, even if the only alleged discriminatory act occurred prior to signing a release of claims. Such retrospection is the heart of what the Ex Post Facto Clause prohibits.

This Court has also made clear that a law ostensibly identified as "civil" may nevertheless be penal in nature and akin to a criminal statute, thereby running afoul of the Ex Post Facto Clause. *See Weaver v. Graham*, 450 U.S. 24, 31 (1980) ("[I]t is the effect, not the form, of the law that determines whether it is *ex post facto*."); *Harisiades v. Shaughnessy*, 342 U.S. 580, 595 (1952). "In determining whether legislation which bases a disqualification on the happening of a certain past event imposes a punishment, the Court has sought to discern the objects on which the enactment in question was focused." *Flemming v. Nestor*, 363 U.S. 603, 613-14 (1960). A civil sanction constitutes impermissible "punishment," where it "may not be fairly characterized as remedial, but only as a deterrent or retribution." *See United States v. Halper*, 490 U.S. 435, 449 (1989); *Myrie v. Comm'r, N.J. Dep't of Corr.*, 267 F.3d 251, 256 (3d Cir. 2001); *Johnson v. S.E.C.*, 87 F.3d 484 (D.C. Cir. 1996) (finding retroactive license suspension to be punishment).

Any attempt by Congress to revive claims that have already been waived by an employee is a "deterrent or retribution" on its face. The reviving of claims that have been waived cannot be considered remedial in nature because aggrieved employees were already armed with a cache of equitable, legal, and financial remedies prior to the LLFPA.

Because the LLFPA's resurrection of claims that had been waived operates to effect punishment, the fact that the legislation is superficially categorized as "civil" is of no consequence. Accordingly, retroactive application of the LLFPA is unconstitutional under the Ex Post Facto Clause.

II. Petitioners Have Presented No Compelling Reasons To Grant The Petition, Where The Eleventh Circuit's Opinion Affirming The District Court's Summary Judgment Order Applied Settled Law In Finding That There Was No Genuine Issue Of Material Fact That Pension Status Under The DROP Was Not A Proxy For Alleged Age Discrimination.

Petitioners urge this Court to reconsider its decision in *Kentucky Retirement Systems v. EEOC*, 128 S. Ct. 2361 (2008) in order to address the threshold of evidence required for a plaintiff's ADEA claims to withstand summary judgment on the issue of whether pension status is a proxy for age. Pet. at 24. Petitioners submit that the Eleventh Circuit improperly disregarded testimony by Detective Thomas Mangifesta, president of the police union, that the City insisted upon age as a component of DROP because it "wanted senior officers

to retire as soon as possible." Pet. at 25. As set forth more fully below, this Court provided ample guidance regarding the necessary threshold of evidence to support such claims in *Kentucky Retirement* and most recently in *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009). Accordingly, there are no compelling reasons for the Court to revisit this issue at the present time.

A. The Eleventh Circuit Applied This Court's Well-Settled Law In Affirming The District Court's Determination That Their Differential Treatment Was Not "Actually Motivated" By Age

In affirming the district court's decision, the Eleventh Circuit correctly applied this Court's decision in *Kentucky Retirement* in concluding that Petitioners had not shown that age "actually motivated" the City's decisions. Pet. App. at 5 (citing *Kentucky Ret. Sys.*, 128 S. Ct. at 2366). In *Kentucky Retirement*, this Court held that where an employer adopts a pension plan that includes age as a factor, and employees are then treated differently based on pension status, "a plaintiff, to state a disparate treatment claim under the ADEA must adduce sufficient evidence to show that the differential treatment was 'actually motivated' by *age*, not pension status." *Kentucky Ret. Sys.*, 128 S. Ct. at 2370 (emphasis in original).

To determine whether the disability retirement plan at issue in *Kentucky Retirement Systems* was "actually motivated" by age and thus violated the ADEA, this Court focused on six factors. First, this Court held that age and pension status are analytically distinct

concepts, and discriminating against someone on the basis of pension status (even when pension status is determined in part on age) is not necessarily indicative of age discrimination. *Id.* at 2367. Second, this Court considered whether the plan was part of "a set of complex systemwide rules" involving pensions and whether benefits were offered to all employees on the same non-discriminatory terms at the time they became employed. *Id.* Third, Kentucky's disability plan had a clear non-age related rationale for the disparity at issue (*i.e.*, to place individuals who were disabled prior to qualifying for normal retirement in a position where they would qualify for normal benefits). *Id.* at 2368. Fourth, older individuals were sometimes treated more favorably under Kentucky's plan. *Id.* at 2369. Fifth, the plan did not rely on any of the sorts of "stereotypical assumptions" that the ADEA sought to eradicate. *Id.* Finally, this Court determined that the difficulty that Kentucky would incur to develop an alternative plan demonstrated that the plan was not actually motivated by age. *Id.*

In this case, the Eleventh Circuit properly upheld the District Court's determination that many of the factors that led this Court to conclude that Kentucky was not motivated by age discrimination when it implemented its disability plan are also present with respect to the City's implementation of the DROP. Pet. App. at 40 -41. In *Kentucky Retirement Systems*, this Court made it clear that its discussion of these factors "provides an indication of what a plaintiff might show in other cases to meet his burden of proving that differential treatment based on pension status is in fact discrimination 'because of' age." *Id.* at 2370. Here, the

testimony by Detective Mangifesta upon which Petitioners rely falls far short of satisfying any of the factors set forth by this Court in *Kentucky Retirement Systems*. As such, Petitioners have not demonstrated any compelling reasons for this Court to review whether such testimony satisfies Petitioners' burden of establishing that the City's implementation of DROP was "actually motivated" by age.

B. Petitioners Have Not Shown That Age Was The "But-For" Cause Of The City's Decision To Implement DROP, As Required By This Court In *Gross v. FBL Financial Services, Inc.*

Petitioners fail to address whether their evidence meets the standard most recently set forth in *Gross*. In that decision, this Court made it clear that to establish a disparate treatment claim under the plain language of the ADEA, "[a] plaintiff must prove by a preponderance of the evidence (which may be direct or circumstantial), that age was the 'but-for' cause of the challenged employer decision." *Gross*, 129 S. Ct. at 2351. As discussed above, Petitioners cannot meet their burden in this case because, as the Eleventh Circuit properly found, the City's DROP treats officers differently based on their pension status and not their age. Thus, Petitioners' age is not the "but-for" cause of the City's decision.

Petitioners have not demonstrated any compelling reason for seeking this Court's review of the Eleventh Circuit's decision where the threshold of evidence for proving their ADEA claims has been settled by this Court. The Eleventh Circuit applied the well-established precedent of this Court in affirming the district court's

grant of summary judgment to the City. Accordingly, the Petition for Writ of Certiorari should be denied.

III. CONCLUSION

Petitioners have not established a compelling reason for this Court to grant their Petition for Writ of Certiorari. Accordingly, for all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

CITY OF FORT
LAUDERDALE,
FLORIDA

Gerald L. Maatman, Jr.
Counsel of Record
SEYFARTH SHAW LLP
131 South Dearborn Street
Suite 2400
Chicago, Illinois 60603
Telephone: (312) 460-5000
Facsimile: (312) 460-7000

Frederick T. Smith
SEYFARTH SHAW LLP
1545 Peachtree Street, N.E.
Suite 700
Atlanta, Georgia 30309
Telephone: (404) 885-1500
Facsimile: (404) 892-7056

Attorneys for Respondent